

must we now the law bestir?
Can we not with more consequential matters deal, I implore?"
Quoth Colonel Raven, "Nevermore"

"Be that word our sign of parting, sir" I shrieked, upstarting—
"Get thee back into the tempest and the Night's Plutonian shore

The issue's dead; leave no woe as your token that thy soul has spoken

Leave our complacency unbroken—quit the office and my door

Take thy gaze from out my heart and take thy plea from my PC.

Of CD-Roms, and TV witness testimony remote; of annual Manuals,

That is today—be no bore!

Enough!"

Quoth Colonel Raven, "Nevermore"

Colonel Raven, shade never flitting, still is sitting

on my desk near to my office door

Says he with visage ever piercing:

"Judicial Independence we must implore

with mid-career tenure as our floor

Can there justice be without belief?

Can those we judge in our findings find relief?

What of credible judicial oaths?

Will they our sentences believe or proxy lackeys see with boasts?

What of *faith*—theirs and ours?"

"So," I said, with heart arising—

"We must the Uniform Code amend?

To establish justice actual—and perceptual

—of image pure, and credible"

And the heart light from him streaming, vanquishes his shadow from the floor

and our judicial souls from out that shadow, that lies in history alone

Shall be lifted—Evermore!

Fredric Lederer¹¹²

International and Operational Law Notes

Legal Training Handbook for the Ukrainian Military

Coinciding with President Clinton's May 1995 visit to Ukraine, a first of its kind democracy building project

between The Judge Advocate General of Ukraine and United States Army lawyers was completed in Kiev. Over the course of this eight-month project, from September 1994 to May 1995, United States Army judge advocates from the International and Operational Law Division, Office of The Judge Advocate General,¹¹³ worked directly with Colonel Alexander Bokov, Chief, Legal Service of the Ministry of Defense of Ukraine (the highest judge advocate position in the Ukrainian military) in developing a handbook for Ukrainian soldiers entitled, "Code of Conduct for Participants in Military Operations."¹¹⁴ This handbook now serves as the primary training guide for instructing Ukrainian soldiers in the basics of law of war, human rights, and professional ethics.

Although more expansive in content, the Ukrainian handbook is patterned after the very successful Peruvian Human Rights handbook developed by Army lawyers for the Peruvian armed forces in 1993.¹¹⁵ The Ukrainian handbook is pocket sized, made of durable paper, and has been officially adopted by the Ukrainian Ministry of Defense as the standard training text for the Ukrainian armed forces.

Using a Ukrainian printing company, 100,000 copies of the handbook were produced at a cost of approximately \$25,000.¹¹⁶ Once the handbooks were printed, United States judge advocates assisted in both training a cadre of Ukrainian judge advocates to teach the subject matter of the handbook to their soldiers and in developing a systematic plan as how best to distribute the handbook.

The handbooks are now a part of the core instruction at each major military training center, and a Ukrainian judge advocate conducts this training for all soldiers who have more than six months of active service remaining on their enlistments. United States Army judge advocates observed the first such training session from 18 to 22 April 1995, at the Ukrainian city of Lviv, the training center for the Western sector of Ukraine.

As with all initiatives undertaken to assist the militaries of emerging democracies, the success of the United States effort to assist in institutionalizing the law of war and human rights training in the Ukrainian armed forces must be tempered by the fact that this training can be effective only to the degree that it is fully embraced by the military. With a standardized training handbook that is truly its own, a legal department trained to teach law of war and human rights, and an armed force that regularly receives such training, the Ukrainian

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¹¹³Colonel Ihor Kotlarchuk (JAGC, USAR) was instrumental in assisting on this project.

¹¹⁴Copies of the handbook and detailed after action reports are on file at the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

¹¹⁵See Jeffrey F. Addicott & Andrew M. Warner, *JAG Corps Poised for New Defense Missions: Human Rights Training in Peru*, *ARMY LAW*, Feb. 1993, at 78.

¹¹⁶Funding was provided under 22 U.S.C. § 5901, popularly known as "Nunn Lugar" funds.

armed forces now have a solid methodology for continuing this effort. In this regard, the strategy throughout this project was to establish and maintain the United States role as one of a "helper." The success of the Ukrainian military in the coming years will be due exclusively to its commitment to continue to teach and train its soldiers in these critical areas of the law. Lieutenant Colonel Jeffrey Addicott, International and Operational Law Division, OTJAG.

Consequences of Violating the Posse Comitatus Act

The following two notes deal with the consequences of violating the Posse Comitatus Act¹¹⁷ (PCA). Although a criminal statute, no one has ever been prosecuted for violating the PCA. However, both criminal and civil consequences may flow from conduct that courts view as violating the PCA. In the criminal context, defendants have attempted to invoke the Exclusionary Rule, alleging that the involvement of military personnel triggered a PCA violation, which required the evidence to be excluded. The first note examines the cases in which defendants have made this claim, while the second note explores cases in which plaintiffs have brought civil claims against military personnel based on an alleged PCA violation. Both notes caution that, while courts rarely have ruled in favor of the civilian claimant in either situation, judge advocates should be aware of these potential adverse consequences. Lieutenant Commander Winthrop.

The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act

Introduction

With increasing frequency, criminal defendants rely on the PCA in an attempt to suppress evidence. In the typical case, military personnel are involved with civilian law enforcement authorities in the fight against drugs. As a result of these operations, illegal drugs are seized and civilians are brought to trial in federal or state criminal courts. At trial, the defendants allege that, under the Exclusionary Rule,¹¹⁸ the evidence should be suppressed because it was obtained in violation of the PCA.

¹¹⁷ U.S.C. § 1385.

¹¹⁸ The Exclusionary Rule is a judicially created remedy designed to deter "unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹⁹ *United States v. Banks*, 539 F.2d 14, 16 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *see also* H.R. REP. NO. 97-71, pt. II, 97th Cong., 1st Sess. 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1781, 1785 [hereinafter H.R. REP. NO. 97-71].

¹²⁰ The phrase "posse comitatus" is literally translated from the Latin as the "power of the county." It is defined at common law to refer to all those over the age of 15 on whom a sheriff could call for assistance in preventing any type of civil disorder. H.R. REP. NO. 97-71, *supra* note 119, at 1786 (citing 1 W. BLACKSTONE, COMMENTARIES 343-44).

¹²¹ 18 U.S.C. § 1385.

¹²² *See* 10 U.S.C. §§ 371-378.

¹²³ *See* H.R. REP. NO. 97-71, *supra* note 119, at 1785.

Although defendants rarely are successful when invoking the PCA, the PCA continues to be a focal point of litigation whenever the military assists civilian law enforcement authorities to combat illegal drugs. Accordingly, this note will: provide a brief overview of the PCA; examine the key federal and state court cases that have addressed the applicability of the Exclusionary Rule to PCA violations; and address the reasons that some courts view the Exclusionary Rule as an inappropriate remedy for PCA violations.

Overview of the Posse Comitatus Act

The PCA, originally enacted shortly after the Civil War, was intended to "eliminate the direct active use of Federal troops by civil law authorities" to enforce civil laws.¹¹⁹ The PCA provides, in its entirety, as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus¹²⁰ or otherwise to execute the laws shall be fined or imprisoned not more than two years, or both.¹²¹

The PCA reflects a national policy to limit the role of the military in civilian life. Nevertheless, Congress has recognized that in some areas of civilian life the military—because of its expertise and specialized equipment—can, and should be, of great assistance to civilian law enforcement authorities. One of these areas involves the fight against illegal drugs.

In 1981, in an effort to further combat drug smuggling into the United States, Congress enacted statutes designed to clarify and liberalize the PCA's restrictions.¹²² Pursuant to these provisions, "Congress intended to maximize the degree of cooperation between the military and civilian law enforcement to stem the influx of illegal drugs into the country, while also recognizing the need to maintain the traditional balance of authority between civilians and the military."¹²³